United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

my affidavit

76-4144

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4144

LILIAN ILUSTRISIMO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
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MARY P. MAGUIRE,
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BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Lilian Ilustrisimo petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on March 5, 1976. That order dismissed an appeal from a decision of an Immigration Judge denying petitioner's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h). Petitioner contends that the Board's order should be reversed as being arbitrary, capricious, and an abuse of discretion. This petition was filed on June 14, 1976. Since that time petitioner has enjoyed the automatic statutory stay of deportation which accompanies a petition for review under Section 106 of the Act.

Statement of Facts

The petitioner is a forty year old alien, a native and citizen of the Philippines, who entered the United States on March 9, 1970 as a nonimmigrant visitor for pleasure authorized to remain in the United States until September 8, 1970. She was denied any further extensions of her temporary stay and thereafter granted a period within which to depart voluntarily from the United States on or before October 8, 1970. She failed to depart and was subsequenty located by the Service on March 28, 1974 at her place of employment in Hartford, Connecticut.

On May 6, 1974 deportation proceedings were instituted against the petitioner by the issuance of an order to show cause and notice of hearing (AR49).* The petitioner did not appear for the hearing scheduled on May 21, 1974, apparently because she had changed her address without informing the Service. She was arrested by the Service on May 22, 1974 and was released on bond.

At the deportation hearing which was held on July 9, 1974, petitioner, who was represented by counsel, admitted the truth of the allegations in the order to show cause and requested that she be granted the privilege of voluntary departure (AR22-23). The petitioner at first elected Germany as the country to which she preferred to go if it were ordered that she be deported. She was advised that her deportation would be directed in the first instance to Germany, if deportation were required, and in the alternative to the Republic of the Philippines. She stated that she wished to file an application for tem-

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* References preceded by "AR" are to the certified administrative record previously filed with the Court.

porary withholding of deportation to the Philippines pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h), on the ground that she feared persecution in the Philippines because of her political beliefs (AR). She was granted time to file an application for temporary withholding of deportation, the application was duly filed, and the hearing continued to consider that application. At the continued hearing the petitioner changed the designation of the country to which she preferred to go, if she were to be deported, to Spain (AR32).

At the continued hearing on March 24, 1975 the petitioner testified in support of her application for withholding of deportation to the Philippines. Petitioner's evidence in support of her application consisted of her own testimony concerning her membership in a student organization and some published material from the New York Times and Newsweek relating to the Marcos government and its opponents. The petitioner also submitted an alleged Marcos "blacklist" of Filipinos in the United States, although her name did not appear on that list. In response to petitioner's application for Section 243(h) relief, the Service trial attorney offered into evidence an advisory opinion obtained by the District Director from the Department of State in response to his inquiries regarding petitioner's request for political asylum.* The Immigration Judge received the advisory opinion over the objection of petitioner's counsel.

On March 24, 1975, at the close of the continued hearing, the Immigration Judge rendered a decision denying the petitioner's application for withholding of deportation under Section 243(h) of the Act, finding that peti-

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* These documents included the District Director's request for an advisory opinion dated August 27, 1974, petitioner's sworn statement dated August 22, 1974 and the Department of State's response dated January 29, 1975.

tioner had failed to sustain her burden of establishing that she had a reasonable fear of persecution within the meaning of that provision of the Act (AR13-21). The Immigration Judge granted petitioner the privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e).

Petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals and on March 5, 1976 the Board, in a *per curiam* opinion, affirmed the decision of the Immigration Judge and dismissed the appeal (AR4-5).

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. § 1253—

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulation

Title 8, Code of Federal Regulations (C.F.R.)

§ 242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to

> Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

POINT I

The Attorney General did not abuse his discretionary authority in denying petitioner's application for temporary withholding of deportation.

A. General Background

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* *Muscardin* v. *Immigration and Naturalization*

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* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. § 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. § 3.1.

Service, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. § 242.17(c); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). See also *Hyppolite* v. *Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena* v. *Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In its most recent opinion in a Section 243(h) case, this Court indicated that the determination whether or not persecution, within the meaning of § 243(h), would actually occur in the event of deportation was a finding of fact—distinct from the exercise of administrative discretion to stay deportation—and "must pass the substantial evidence test." *Zamora* v. *Immigration and Naturalization Service*, — F.2d — (2d Cir., decided April 29, 1976), quoting *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715, 717 (2d Cir. 1966). Thus, the decision process of the Board with respect to a Section 243(h) application is a two-step process. See *United States ex rel. Kordic* v. *Esperdy*, 386 F.2d 232, 238 (2d Cir. 1967). First, the Board determines, as a factual matter, the probability that the petitioner would be

subject to persecution; second, the Board must exercise its discretion on the facts found. This Court's review of the second step of the process, the Board's exercise of discretion, is governed by the much less demanding "abuse of discretion" standard. *Hamad* v. *Immigration and Naturalization Service*, 420 F.2d 65 (D.C. Cir. 1969); *Zamora* v. *Immigration and Naturalization Service, supra*, fn. 3. In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin* v. *Immigration and Naturalization Service, supra.* Unless that determination is found to be without rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang* v. *Immigration and Naturalization Service, supra.*

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the petitioner's application for withholding of deportation. *Li Cheung* v. *Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis* v. *Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution

From the facts of this case it is evidence that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him and affirmed by the Board were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies, nor did it rest

on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu* v. *Immigration and Naturalization Service*, *supra*. Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that she would be subject to persecution. *MacCaud* v. *Immigration and Naturalization Service*, 500 F.2d 355 (2d Cir. 1974). This she was unable to do. The basis of petitioner's claim is her testimony that she was a member and second secretary of a student organization which held meetings and rallies in opposition to the Marcos administration. Petitioner testified that she attended meeting and rallies at which she spoke against the Marcos government. However, petitioner also testified that she was never arrested and that she never had any difficulty with the police while she was in the Philippines. Her mother, four brothers and one sister reside in the Philippines and none of them has been persecuted for any reason by the Marcos government.

It is submitted that there is substantial evidence in the record to support the Board's finding that petitioner failed to sustain her burden of showing a well-founded fear that her life or freedom will be threatened in the Philippines on account of her race, religion, nationality, or membership in a particular social group or political opinion. Petitioner has not met the burden of proving that she would be singled out as an individual and persecuted upon her return to the Philippines. Accordingly, there was no abuse of discretion in denying her withholding or deportation.

C. The Immigration Judge did not err in admitting into evidence the advisory opinion obtained from the Department of State

The petitioner contends that the Immigration Judge erred in "relying" upon the advisory opinion of the Department of State and in not giving proper credence and weight to petitioner's testimony. It is submitted that petitioner had the opportunity to submit any information she wished to substantiate her claim of anticipated persecution. This opportunity was afforded her both in connection with her application to the District Director for political asylum and in the continued deportation hearing with respect to her section 243(h) application.

With respect to the introduction of the advisory opinion of the Department of State at the deportation hearing, this Court has stated its unwillingness to announce a rule that would call for the reversal of all denials of Section 243(h) applications when a Department of State advisory opinion has been received at the hearing. *Zamora* v. *Immigration and Naturalization Service, supra.* Rather, this Court indicated that before it would reverse a denial of a Section 243(h) application because of the receipt of a Department of State recommendation, a petitioner must show some likelihood that it influenced the result. *Zamora* v. *Immigration and Naturalization Service, supra.* In *Zamora*, which also involved Filipino nationals, this Court found that the petitioners' cases were "exceedingly weak" since their case, like that of this petitioner, rested mainly on their having participated in 1969 or 1970 in anti-government street demonstrations for which other participants had been arrested. The Court also noted that the Zamoras, like this petitioner, had not been arrested and had been allowed freely to leave the Philippines. After concluding that the Immigration Judge

and the Board had ample grounds for rejecting the applications apart from the Department of State recommendation, the Court found that in the cases before it there had been either no reliance placed on the Department of State recommendation or that such reliance had been expressly disclaimed.

It is submitted that the record in this case provided ample grounds for the Immigration Judge to reject petitioner's application for withholding of deportation. It is also clear from the decision of the Immigration Judge that he did not rely on the Department of State recommendation in reaching his decision. Indeed, as the opinion indicates, the Immigration Judge viewed the Department of State letter as being "merely confirmatory" of the decision reached on the record of the hearing. The Immigration Judge enjoyed the advantage of seeing and hearing the petitioner and was in the best position to determine the accuracy, reliability and truthfulness of her testimony. His evaluation thereof is entitled to great weight. *Kokkinis* v. *District Director*, 429 F.2d 938 (2d Cir. 1970). The deportation hearing complied with all the requirements of a fair hearing. *Sung* v. *McGrath*, 339 U.S. 33 (1950). The petitioner was represented by counsel and was given the opportunity to be heard and to introduce evidence and credible witnesses on her behalf. Absent any showing of abuse of discretion the decision of the Immigration Judge should be permitted to stand.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
September 13, 1976

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4144

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

15th day of September, 1976 she served a copy of the within **Printed copies of govt brief**

by placing the same in a properly postpaid franked envelope addressed:

Joseph M. Tapper, Esq.,
Ritter, Tapper & Totten, Esqs.,
266 Pearl St.
Hartford, Conn.

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

15th day of September, 1976

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977